Civil and Administrative Tribunal
New South Wales

Case Name:	The Owners – Strata Plan No 79633 v Graorovska (No 2), Graorovska v The Owners – Strata Plan No 79633 (No 2)
Medium Neutral Citation:	[2021] NSWCATCD
Hearing Date(s):	06 December 2021 (on the papers)
Date of Orders:	06 December 2021
Date of Decision:	06 December 2021
Jurisdiction:	Consumer and Commercial Division
Before:	Graham Ellis SC, Senior Member
Decision:	In SC 21/157634 1. No order for costs by reason of the order made in the related proceedings (SC 21/19101). In SC 21/19101: 1. The Tribunal dispenses with a hearing on the question of costs, pursuant to s 50(2) of the *Civil and Administrative Tribunal Act* 2013. 2. The respondent (owners corporation) is to pay the costs of the applicant (lot owner) on and after 22 October 2021 on the ordinary basis, as agreed or as assessed. 3. The Tribunal notes, for the purpose of s 104 of the *Strata Schemes Management Act* 2015, that the applicant (lot owner) is to be regarded as a successful party.
Catchwords:	COSTS – Whether amount claimed or in issue exceeded $30,000 - Whether special circumstances
Legislation Cited:	*Civil and Administrative Tribunal Act* 2013 *Civil and Administrative Tribunal Rules* 2014 *Strata Schemes Management Act* 2015

Cases Cited:	*Bonita v Shen* [2016] NSWCATAP 159 *Cripps v G & M Mawson* [2006] NSWCA 84 *Hunter Development Brokerage Pty Ltd v Cessnock City Council (No 2)* [2006] NSWCA 292 *Megerditchian v Kumond Homes Pty Ltd* [2014] NSWCATAP 120 *News v Cotes* [2019] NSWCATAP 186 *Oshlak v Richmond River Council* [1998] HCA 11 *The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd* [2018] NSWCATAP 256 *The Owners Strata Plan No 80412 v Vickery (No 2)* [2019] NSWCATAP 97 *Thompson v Chapman* [2016] NSWCATAP 6 *Wentworth v Rogers* (1988) 4 NSWLR 481 *Winne Avenue Property Pty Limited v MCHQ Pty Limited* [2018 NSWCATAP 197
Category:	Judgement on costs
Parties:	In SC 21/15634: The Owners – Strata Plan No 79633 (Applicant) Ms V Graorovska (Respondent) In SC 21/19101: Ms V Graorovska (Applicant) The Owners – Strata Plan No 79633 (Respondent)
Representation:	Mr R Khan (Ms V Graorovska) No submissions (The Owners – Strata Plan No 79633)
File Number(s):	SC 21/15634, SC 21/19101
Publication Restriction:	Nil

REASONS FOR DECISION

Outline

1 On 22 October 2021 the Tribunal heard two applications and on 29 October 2021 orders were made and reasons published. It is sufficient for the present purposes to summarise the outcome as that the lot owner was ordered to provide access and the owners corporation was ordered to carry out work.

2 By way of summary, the Tribunal decided (1) that the costs of both applications should be considered together, (2) that the question of costs fell to be determined by reference to s 60 of the *Civil and Administrative Tribunal Act* 2013 (CATA), (3) that there were special circumstances warranting an order for costs by reason of the offer made by the lot owner on 21 October 2021, and (4) that the lot owner should be regarded as a successful party for the purpose of s 104 of the *Strata Schemes Management Act* 2015 (SSMA).

Submissions for the lot owner

3 Written submissions dated 12 November 2021 were provided by solicitor for the lot owner. Those submissions agreed that costs should be determined on the papers, indicated that a total of $32,942.44 was incurred in legal costs, sought an order that the owners corporation pay the costs of the lot owner, and made submissions as to the application of s 104 of the SSMA.

4 It was contended that, since the report of the lot owners expert assessed an amount of $45,772.99 and the joint report suggested a total cost of rectification of $46,350.86, the amount claimed or in dispute exceeded $30,000 with the result that costs were governed by rule 38 of the *Civil and Administrative Rules* 2014 rather than s 60 of the CATA. Based on that contention, it was submitted that costs should follow the event and that it was not necessary for the lot owner to establish special circumstances.

5 If s 60 was found to be the applicable provision, it was submitted that paragraphs (c), (e) and (g) of s 60(3) applied.

6 As to paragraph (c), the lot owner maintained that there was no tenable basis for the owners corporation's claim that access had been denied by the lot owner and reference was made to the Appeal Panel decision in *Winne Avenue Property Pty Limited v MCHQ Pty Limited* [2018 NSWCATAP 197 at [36]. In relation to the lot owner's application, it was noted that the Tribunal's order was based on the scope of works for which her expert, Mr Coombes, contended and that the expert upon whose evidence the owners corporation relied, Mr Ilievski, had only conducted a desktop review.

7 As to paragraph (e), it was contended that the application of the owners corporation was vexatious, relying on what was said by Roden J in *Wentworth v Rogers* (1988) 4 NSWLR 481 at 491. Reference was also made to the conduct of the owners corporation in relation to addressing the defects which became the subject of a work order.

8 As to paragraph (g), after referring to what was said by Basten JA in *Hunter Development Brokerage Pty Ltd v Cessnock City Council (No 2)* [2006] NSWCA 292 at [50], the submissions expressed reliance on attachments which revealed that a settlement offer contained in a letter dated 21 October 2021 the response to which was a rejection and counter offer the next day.

9 In addition, it was noted that (1) the cross-application sought costs and damages with the result that the owners corporation were put on notice that costs would be sought, (2) the lot owner took steps to contain her legal costs, (3) there was financial detriment to the lot owner, and (4) the majority of the defects the subject of these proceedings were raised by the lot owner as early as 26 September 2014. Submissions were also made as to the operation of s 104 of the SSMA.

10 There were also submissions made to the effect that the owners corporation initiated the proceedings which sought an access order without properly seeking to resolve the real issues in dispute. It was said that the lot owner provided access on 17 August 2020 and 28 October 2020, by reference to documents included in the lot owner's evidence. Finally, it was noted that the

assessed cost of the remedial works exceeded the costs incurred by the lot owner.

Submissions for the owners corporation

11 The owners corporation did not lodge any written submissions on costs, which was said to be on the basis that an appeal was being pursued. As a result, the Tribunal was not provided with disclosure of the costs incurred by the owners corporation in relation to these applications.

12 It is disappointing when a party and/or the lawyer for that party, with a statutory obligation to assist the Tribunal imposed by s 36(3) of the CATA, does not provide submissions on a matter which the Tribunal is required to consider.

Relevant law

13 By reason of s 35 of the CATA, s 60 yields to rule 38 of the CATR with the result that, in proceedings in the Consumer and Commercial Division of the Tribunal where the amount claimed or if dispute exceeds $30,000, it is not necessary to show special circumstances.

14 The question of whether rule 38(2)(b) applies was considered in *The Owners Corporation Strata Plan No. 63341 v Malachite Holdings Pty Ltd* [2018] NSWCATAP 256 (*Malachite*) which established that it is necessary for either: (1) the amount claimed to exceed $30,000; or (2) the amount in dispute to exceed $30,000; or (3) there to be credible evidence which, if accepted, would establish an entitlement to an order for more than $30,000.

15 On the other hand, rule 38(2)(b) does NOT apply where either: (1) the proceedings do not involve a request for payment, or relief from payment, of $30,000 or less; or (2) the relief sought does not depend on a finding that an amount of money is owed.

16 When rule 38(2)(b) applies, there is a general discretion to award costs and it is well established, by decisions such as *News v Cotes* [2019] NSWCATAP 186, *Bonita v Shen* [2016] NSWCATAP 159 and *Thompson v Chapman* [2016] NSWCATAP 6, that: (1) the starting point is that the usual order for costs should be in favour of the successful party, (2) the award is not to punish the unsuccessful party but to compensate the successful party for the costs incurred in the proceedings, and (3) departure from the usual order is permissible if the circumstances favour that course of action.

17 Simply stated, when rule 38 applies it is not necessary to establish special circumstances and the usual order is that costs follow the event (ie follow the outcome of the case) unless there is disentitling behaviour by the successful party: *Oshlak v Richmond River Council* [1998] HCA 11.

18 When rule 38(2)(b) does not apply then s 60 applies and s 60(1) provides that "*Each party to proceedings in the Tribunal is to pay the party's own costs*" but s 60(2) relaxes that default position by providing that "*The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs*". The following non-exhaustive list of considerations is set out in s 60(3):

> (a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,
> (d) the nature and complexity of the proceedings,
> (e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,
> (f) whether a party has refused or failed to comply with the duty imposed by section 36(3),
> (g) any other matter the Tribunal considers relevant.

19 Although it common for parties to focus upon whether any of those individual considerations apply, the Tribunal is required to make a global assessment of

whether there are special circumstances, having regard to the matters set out in subsection 60(3).

20 It is well-established that the adjective "*special"* requires circumstances that are out of the ordinary but do not need to be extraordinary or exceptional: *Megerditchian v Kumond Homes Pty Ltd* [2014] NSWCATAP 120, adopting what was said in *Cripps v G & M Mawson* [2006] NSWCA 84 at [60].

21 Since s 60(2) commences with the words "*The Tribunal may award costs …*", it is clear the Tribunal has a discretion which must be exercised. It is necessary to consider not only whether there are special circumstances but also whether those circumstances warrant an award of costs.

22 There was also reference to s 104 of the SSMA which provides as follows:

> (1) An owners corporation cannot, in respect of its costs and expenses in proceedings brought by or against it for an order by the Tribunal, levy a contribution on another party who is successful in the proceedings.
>
> (2) An owners corporation that is unsuccessful in proceedings brought by or against it for an order by the Tribunal cannot pay any part of its costs and expenses in the proceedings from its administrative fund or capital works fund, but may make a levy for the purpose.
>
> (3) In this section, a reference to **proceedings** includes a reference to proceedings on appeal from the Tribunal."

23 That section was also considered in *The Owners Strata Plan No 80412 v Vickery (No 2)* [2019] NSWCATAP 97 at [25-27] where it was noted that s 104 operates to regulate the position and does not provide any power for the Tribunal to make an order. It therefore appears that the Tribunal should do no more than note, for the avoidance of doubt, that a lot owner is a successful party.

Consideration

24 These applications were not separate in distinct since the owners corporation sought an order for access for the purpose of inspection and repairs while the lot owner sought an order for repairs to be carried out. Given the relationship

between the applications, and the undesirability of any order creating a need to consider what costs attributable to each application, the Tribunal considers the question of costs by reference to both applications together.

25 While the lot owner makes a number of submissions in relation to the application of the owners corporation, if the lot owner was willing to provide access then that application could and should have been finalised, if not by consent orders, then at least on the basis that the only issue requiring determination was the scope of the remedial works.

26 In relation to these applications, the only matters which should have remained for the Tribunal to determine are the differences between the opinions of Mr Coombes for the lot owner and Mr Ilievski for the owners corporation, being the matters raised in their joint report.

27 While the lot owner may have included a claim for damages in her cross-application, the reality is that in these proceedings the relief sought does not depend on a finding that an amount of money is owed. Based on what was said in *Malachite*, the Tribunal is not persuaded that rule 38 applies in this instance with the result that the lot owner is only entitled to an order for costs in her favour if there are special circumstances which warrant an order for costs.

28 Having reviewed the matters raised in the submissions for the lot owner, the Tribunal is satisfied that there was a tenable basis for the application which sought not only access but also to carry out work and that, as a result, the application cannot be said to have been vexatious. However, the Tribunal is satisfied there are special circumstances which warrant an order for costs resulting from the settlement offer made by the lot owner's solicitor on 21 October 2021.

29 That offer was made in a document attached to an email which suggested the offer was a *Calderbank* offer, a reference to the decision in *Calderbank v Calderbank* [1975] 3 All ER 333 which revealed a strategy employed in Family

Court proceedings in the United Kingdom, as an alternative to paying money into court, of conveying an offer of settlement in writing to the other party, indicating an intention to rely on that letter to seek an order for costs if a better outcome was not subsequently obtained at the hearing.

30 A close consideration of what was proposed in that offer reveals that the lot owner clearly achieved a better outcome at the hearing. The Tribunal is satisfied that offer should have been accepted by the owners corporation, not only with the benefit of hindsight by comparing the outcome to the offer but also because, considered in isolation on the afternoon prior to the hearing, it represented a reasonable compromise. Obviously, had that offer been accepted then the hearing would not have been required with a saving of time and cost for both parties and the Tribunal.

31 Being satisfied that the 21 October 2021 offer made by the solicitors for the lot owner constitutes a special circumstance which warrants an order for costs, the appropriate order is for the owners corporation to pay the lot owners costs of the applications incurred on and after 22 October 2021 on the ordinary basis, as agreed or as assessed.

32 The purpose of s 104 of the SSMA is plainly to shield a lot owner from being required to contribute to the costs of an owners corporation in proceedings in which she was successful. It is noted that the owners corporation could suggest it was successful in its application because an order for access was made. However, the application of the owners corporation was for access in order to inspect and carry out remedial work with the result that the question of what was the appropriate remedial work was common to both applications.

33 In circumstances where one party evinces an intention not to participate in the determination of costs, there is no point in holding a hearing and the Tribunal is thus satisfied that it should dispense with a hearing, pursuant to s 50(2) of the CATA.

Orders

34 For the reasons set out above, the orders that will be made are as follows:

In SC 21/157634

1. No order for costs by reason of the order made in the related proceedings (SC 21/19101).

In SC 21/19101:

1. The Tribunal dispenses with a hearing on the question of costs, pursuant to s 50(2) of the *Civil and Administrative Tribunal Act* 2013.

2. The respondent (owners corporation) is to pay the costs of the applicant (lot owner) on and after 22 October 2021 on the ordinary basis, as agreed or as assessed.

3. The Tribunal notes, for the purpose of s 104 of the *Strata Schemes Management Act* 2015, that the applicant (lot owner) is to be regarded as a successful party.

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I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar